SUPREME COURT, U. S.

SEP 5 1973

MICHAEL RODAK, JR., C

No. 72-1637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MEMORANDUM OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, IN SUPPORT OF PETITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, joins petitioner in praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on March 8, 1973.

QUESTION PRESENTED

Whether a collective bargaining representative may lawfully waive the right guaranteed to employees by Section 7 of the National Labor Relations Act to distribute union literature during nonworking time in nonworking areas of the plant.

STATEMENT

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, hereinafter called the Union, was a party to the proceedings in the Court of Appeals in which the judgment here sought to be reviewed was entered (Pet. Apps. A and B, pp. 13, 16, of the Petition herein). Accordingly, pursuant to Rule 21(4) of this Court the Union is a respondent in this Court although not named as such by the petitioner in its petition for a writ of certiorari.

The Union, not having filed any petition for a writ of certiorari, is, of course, here bound by the affirmance by the court below of the finding of the Board that the Union had agreed by its collective bargaining contract with the Company to waive the rights of employees to distribute literature in nonworking areas of the plant on nonworking time. However, in appraising the kind of waiver of employee rights in which the Union allegedly engaged, it should be noted that neither the Board nor the court below found any language in the collective bargaining contract by which the Union expressly waived those rights. Rather the waiver is created out of a two-step inference. The reasoning utilized by the Board and the court below to find a waiver is as follows:

The collective bargaining agreement contains an express provision granting to the Company the right to

make rules and regulations, which reads as follows (Pet. App. C, p. 35, fn. 3).

> "The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature, nor will they conflict with the terms of this agreement."

The Company had no written rule barring distribution on company property. The only set of written rules introduced in evidence at the hearing before the Trial Examiner appeared in an Employee Relations Handbook distributed prior to the Union's certification in 1954 or 1955 (Pet. App. C, p. 32). This set of rules contained no mention of distribution, although Rule 6 prohibited "Solicitation of any kind on Company property during working hours." The Trial Examiner found this rule was not involved in this case (Pet. App. C, p. 35, fn. 3). The same handbook, in another portion, not identified as plant rules, contained the statement, "You are asked to refrain from distributing notices or handbills in the parking lots or on other Company property" (Pet. App. C, p. 32). It is this statement in the old employee handbook which did not appear in the list of plant rules which is contained in the same handbook, which was elevated by the Trial Examiner and the Board to the status of a rule within the meaning of the collective bargaining contract use of the word rule and by implied agreement thereto, the Union was found to have waived the right of the employees to distribute union literature in nonwork areas of the plant on nonworking time (Pet. App. C, pp. 32-33, 39).

The Union had succeeded in 1954 or 1955 in securing certification without distributing on Company property and not until 1970 did the Union have occasion to wish to make a distribution on Company property (Pet. App. C, p. 38). When the Company refused the Union promptly filed charges with the National Labor Relations Board and then discovered that it had waived this right, albeit, in the Board's view (Pet. App. C, pp. 18-25), an illegal waiver. The Board's order invalidated the waiver to the extent that the waiver permitted the employer to prohibit employees from distributing literature in nonworking areas on nonworking time on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees in a unit appropriate for collective bargaining or other matters related to the exercise by employees of their Section 7 rights (Pet. App. C, p. 25).

The Court of Appeals, however, held the waiver valid and set aside the Board's order (Pet. App. A, pp. 13-17).

REASONS FOR GRANTING THE WRIT

1. The importance of the question presented deserves resolution by this Court of the conflict which has arisen among the circuits as described in the petition for a writ of certiorari, pp. 6-8. The exercise by workers of their rights of free speech and free press with respect to their organization and improvement of their conditions of employment has been described by this Court as "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill*

v. *Alabama,* 310 U.S. 88, 102 (1940), quoted with approval in *Thomas* v. *Collins,* 323 U.S. 516, 532 (1945).

The protection accorded by the National Labor Relations Act to employee freedom to solicit and distribute union literature is similar to the constitutional protection accorded free speech and free press in that both are "fashioned to secure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U.S. 476, 484 (1957), quoted *New York Times* v. *Sullivan,* 376 U.S. 254, 269 (1964). The nonworking area of the plant during nonworking time is the "place uniquely appropriate" for the exercise of this right. *Republic Aviation Corp.* v. *N.L.R.B.,* 324 U.S. 783, 801, n. 6 (1945).

Law review commentators are generally agreed that the right to solicit memberships and distribute union literature "are too closely related to the Act's essence, the spread of collective bargaining, to permit a legally effective waiver." William B. Gould, The Question of Union Activity on Company Property, 18 Vanderbilt Law Rev. 78,145 (December 1964). Compare William B. Gould, Union Organizational Rights and the Concept of 'Quasi-Public' Property, 49 Minn. L. Rev. 505, 513 (January 1965); Labor Law—Collective Bargaining—Employer May Not Enforce Collective Bargaining Provision Embodying Union Waiver of Employee's Right to Solicit Against That Union, 22 Vanderbilt Law Rev. 664 (April 1969); Labor Law— Solicitation and Distribution—Collective Bargaining Proviso Prohibiting Employee Solicitation and Distribution on Company Premises During Non-Working Time and in Non-Working Areas Constitutes a Violation of Section 8(a)(1), 14 Villanova Law Rev. 552, 557

(Spring 1969). In *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 237, fn. 14 (1963) this Court stated that it would not "honor a private settlement which purported to deny to employees the rights guaranteed them by the Act."

The exigencies of modern living have created a situation today in which "Never before have so many Americans had so little time to call their own." Sebastian de Grazia, Of Time, Work & Leisure (20th Century Fund, 1962), p. 70. "The rule of thumb reckons that men spend 10 to 20 percent of their working life going back and forth between home and work." *Ibid*, pp. 72-73." * * * the average American male who works full time—that is, at least 35 hours a week * * * works nearly 48 hours a week." *Ibid*, p. 70. Under these circumstances the ban on distribution of literature in nonworking areas of the plant on nonworking time creates more of an impediment to free communication today than in the past.

2. This Court's decision in *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 293 (1945), has been cited in subsequent opinions as holding that an employer no-distribution rule "has no inferable legitimate business purpose," *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 35 (1967), Mr. Justice Harlan, dissenting; "no significant employer justification," *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 339 (1965), Mr. Justice Goldberg, concurring. Cf. *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 268-269 (1965); *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667, 680 (1961). The Company here cannot be concerned about littering because it regularly distributes a company newspaper to employees in the plant (Pet.

App. C, p. 37). On the other hand, the right to distribute literature, despite its importance to employees, is not one for which a newly certified union can be expected to strike, nor one over which a union can realistically be expected to strike in successive contract negotiations once the right has been waived. See William B. Gould, The Question of Union Activity on Company Property, 18 Vanderbilt Law Rev. 78, 143-144 (December 1964).

The respective considerations applicable to the issue realistically appraised, demonstrate that the question presented merits resolution by this Court.

Respectfully submitted,

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September 4, 1973